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Nos. 87-70 and 87-5107

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

DRAKE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL SAHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instruction on the "enterprise" element of the RICO statute, which simply followed the statutory definition, was reversible error (No. 87-5107).
2. Whether the conviction of petitioner Drake Williams should be reversed because the trial judge failed to question the jury regarding its exposure to certain mid-trial publicity (No. 87-70).
3. Whether the joinder of identical twin brothers for trial in this case was lawful (No. 87-70).
4. Whether petitioner Williams was entitled to a severance from a co-defendant because he wished to call the co-defendant as a defense witness (No. 87-70).
5. Whether the trial judge engaged in improper conduct that constituted reversible error (No. 87-70).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-57a) is reported at 809 F.2d 1072. The court's opinion in response to the petitions for rehearing and suggestions for rehearing en banc (Pet. App. 1a-7a) is reported at 817 F.2d 1136.¹

¹ "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-70.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1987. Petitions for rehearing were denied, with modifications of the original decision, on May 13, 1987. The petitions for a writ of certiorari were filed on July 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A 24-count indictment filed in the United States District Court for the Southern District of Texas charged 14 individuals, including petitioners, with violations of various federal narcotics, racketeering, currency, false statement, and tax laws. Following a joint jury trial, both petitioners were convicted of conspiracy to violate the racketeering statute (RICO), in violation of 18 U.S.C. 1962(d) (Count 1), and of a substantive RICO violation, 18 U.S.C. 1962(c) (Count 2). Petitioner Drake Williams was also convicted of investing the proceeds of racketeering activities in an enterprise, in violation of 18 U.S.C. 1962(a) (Count 3), and of engaging in a continuing criminal enterprise (Count 4), wrongfully concealing from the Department of the Treasury the origin of large amounts of funds transferred through the use of financial institutions (Counts 5 and 6), conspiring to evade the requirement of filing currency transaction reports (Count 7), conspiring to make false federal income tax returns (Count 8), preparing false income tax returns (Counts 10, 18, and 21), and conspiring to possess and possessing cocaine with intent to distribute it (Counts 9, 16, 17, and 20), in violation of 18 U.S.C. 371 and 1001; 21 U.S.C. 841(a)(1), 846, and 848; and 26 U.S.C. 7206(1). See Pet. App. 10a-11a.

Drake Williams was sentenced to 25 years in prison and a \$100,000 fine on Count 4, with lesser terms and fines on other counts to run concurrently with the sentence on Count 4. He was also sentenced to a three-year special parole term. Michael Sahs was sentenced to concurrent 16-year prison terms on Counts 1 and 2 and a \$20,000 fine on Count 1. The court of appeals affirmed petitioners' convictions on all counts except Counts 5 and 6, as to which the government conceded that it had not adequately proved Drake Williams guilty.²

1. The extensive evidence from the eight-week trial is summarized in the opinion of the court of appeals and set forth in detail in the government's brief in the court of appeals. The evidence showed that petitioners and others were members of a large-scale drug trafficking and money laundering operation during the late 1970s and early 1980s.

In the late 1970s co-defendants Vance Williams and Oscar Silva trafficked in marijuana, primarily in Texas. They recruited petitioner Sahs to make deliveries for them as far away as Massachusetts. Sahs prospered in his role as a deliveryman. Although he soon acquired a clientele of his own, he continued to rely on Vance Williams and Silva as drug suppliers. Co-defendant Joseph Watson, who resided in Houston, also sold illegal drugs supplied to him by Vance Williams and Silva. Pet. App. 12a.

² Co-defendant Vance Williams was also convicted, and his conviction was affirmed on appeal. We are not filing a response to his petition for a writ of certiorari in No. 87-87. On September 8, 1987, the court of appeals reversed Vance Williams' conviction. We anticipate that the petition will be withdrawn.

Petitioner Drake Williams, a certified public accountant in Houston and Vance's identical twin, referred customers to Watson and assisted Silva and Vance Williams in acquiring supplies of drugs. In the summer of 1977, for example, Drake helped Vance, Silva, and a fourth partner obtain ten tons of marijuana. They stored the load at a girl scout camp in New Mexico and eventually delivered it to their customers. In addition to supervising the drug trafficking enterprise, Drake Williams also laundered tens of thousands of dollars of the drug proceeds. Pet. App. 12a-13a.

In 1977 Vance Williams was arrested in New Hampshire and charged with drug offenses. He pleaded guilty and served approximately one year in prison and in a halfway house, from mid-1979 to mid-1980. During that period, his co-venturers set aside \$5 for Vance Williams for each pound of marijuana they sold. Pet. App. 13a.

In August 1979, two of Sahs' couriers were arrested in the course of delivering a load of marijuana to undercover police officers in Las Cruces, New Mexico. Sahs reacted with fear that the arrests would make it more difficult to obtain large loads of marijuana from his primary sources, stating that he was uncertain how the "hierarchy" of the "organization," i.e., "the Williams[] boys, Mr. Silva, [and co-defendant] Mr. [Salvatore] Meraz," would respond to the arrests (3/26/85 Tr. 225-227). Sahs thereupon travelled to Houston and met with Drake Williams, Silva, and Watson in Drake Williams' business office. After the meeting, the flow of marijuana to Sahs resumed; it included a 1,500 pound shipment of marijuana that was sent shortly after Sahs met with his co-conspirators. 3/26/85 Tr. 229; 18

R. 201-203. The evidence showed that the operation continued into the early 1980s. The defendants were indicted in 1984 and tried in 1985.

2. The court of appeals reversed the convictions of several of the defendants on some or all counts, but it affirmed the convictions of petitioner Sahs on all counts and it affirmed the conviction of petitioner Drake Williams on all contested counts (Pet. App. 57a). With the exception of Drake Williams' challenge to the sufficiency of the evidence on Counts 5 and 6 (as to which the government agreed), the court of appeals rejected all of petitioners' claims, including those they have renewed in their petitions. We summarize those arguments and the court of appeals' rulings on them below.

ARGUMENT

1. Petitioner Sahs contends (87-5107 Pet. 9-14) that his RICO convictions should be set aside because of inadequate jury instructions on the "enterprise" element of the RICO charges against him. He does not argue that the district court's instructions gave an incorrect definition of that element, for the instruction followed the statutory definition of the term (see Pet. App. 48a). Rather, relying primarily on this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), petitioner argues that an "enterprise," for RICO purposes, must have an ascertainable structure and operate as a continuing unit independent of the associations necessary to conduct the pattern of racketeering activity. He contends that the district court's failure to supplement its instruction with an explanation of that requirement constitutes reversible error. The court of appeals correctly rejected that contention (Pet. App.

48a-51a, 5a-7a), and in the context of this case, the issue does not present a conflict among the circuits that warrants this Court's review.

The RICO statute requires proof not only of a pattern of racketeering activity but also of an "enterprise." A pattern of racketeering activity is a collection of acts (18 U.S.C. 1961(5)); an enterprise, by contrast, is either a legal entity or a collection of persons, including "any union or group of individuals associated in fact" (18 U.S.C. 1961(4)). In *Turkette*, this Court discussed the distinction between the two elements in the course of holding that an "enterprise" did not have to have a legitimate purpose, but could be wholly illegitimate. The Court stated (452 U.S. at 583) that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." In pointing out that these were two different elements of RICO offenses, however, the Court in no way suggested that the enterprise could not be proved, as it was here, by showing that a continuing association of individuals who shared a common purpose acted together to commit a series of racketeering acts. Indeed, any such suggestion would have been inconsistent with the Court's holding that an enterprise may be a group of individuals associated for wholly illegitimate purposes. Moreover, the Court expressly recognized that the proof used to establish the pattern of racketeering activity "may in particular cases coalesce" with the proof offered to establish the enterprise element of RICO (*ibid.*).

As the court of appeals concluded, there is no doubt that the jury in this case found the RICO enterprise to consist of an entity distinct from the pattern of racketeering activity. First, the district court's in-

struction on the enterprise element accurately followed the statutory definition (Pet. App. 48a), requiring the jury to find that the enterprise consisted of a group of individuals, not simply a set of actions. Moreover, several times the district court instructed the jury as to both the pattern and enterprise elements and “carefully distinguished” between them (*id.* at 50a). Further, the instructions on the RICO conspiracy count clearly required that the jury find that petitioners were members of the enterprise alleged in the indictment—a group associated over the course of several years for the purpose of carrying on an illegal drug operation (*id.* at 5a-7a). Finally, the evidence at trial—including petitioner Sahs’ reference to the “hierarchy” and the “organization,” and the set-aside for Vance Williams while he was serving his New Hampshire sentence—make it clear that the defendants were operating a continuing organization for drug selling and related activities. Particularly in light of the allegations in the indictment and the evidence at trial, the jury instructions ensured that the jury understood the enterprise element and gave it separate consideration.

Petitioner suggests that the decision of the court of appeals conflicts with a line of Eighth Circuit cases holding that a RICO enterprise must possess an ascertainable structure “distinct from that inherent in the conduct of a pattern of racketeering.” *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States v. Bledsoe*, 674 F.2d 647, 664-665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). See also *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). None of those cases, however, adopts petitioner’s argument that the jury must be instructed on the need to establish such a

distinct structure. It is clear, moreover, that the Eighth Circuit would find the proof in this case sufficient to establish the required RICO enterprise.

In *Lemm*, the court affirmed the RICO convictions of three defendants who participated in an insurance fraud scheme involving 17 arson fires. The court in that case found (680 F.2d at 1201) that the government had established the existence of a RICO enterprise with a distinct, ascertainable structure because the proof showed that the defendants had engaged in "legitimate purchases and repairs of property" in addition to committing the predicate acts of mail fraud. Here, petitioners clearly regarded the association of which they were a part as an "organization" with a "hierarchy." Moreover, there was overwhelming proof that the group operated as such over several years (even while one of its members was imprisoned and therefore presumably not committing any racketeering acts) and that the various members performed distinct roles in the organization (*e.g.*, supplier, courier, distributor, money launderer). The evidence also established that, in addition to the predicate acts of drug trafficking and interstate travel to facilitate the drug activity, the members of the organization engaged in numerous activities (such as purchasing vehicles) that were not charged as predicate racketeering acts and that furthered the interests of the organization. Like *Lemm*, this case involved the use of the RICO statute as a weapon against "organized criminal activity" and not against "a sporadic and temporary criminal alliance to commit one of the enumerated RICO crimes" (*Lemm*, 680 F.2d at 1201). The evidence in this case was therefore sufficient to establish the existence of an "enterprise" under any

definition, including that employed by the Eighth Circuit.³

2. Petitioner Drake Williams contends (87-70 Pet. 2-3) that the court of appeals erred in failing to consider the effect of certain mid-trial publicity on his conviction. This contention does not merit the Court's review.

One month into the eight-week trial, witness Julia Reinhart came forward for the first time and revealed, in testimony outside the jury's presence, that Vance Williams and co-defendant Oscar Silva had been involved in drug deals during the trial. The district court immediately revoked the bail of those defendants and ordered them returned to the custody of the United States Marshal. The media covered the incident extensively. One newspaper featured a front page headline with a color photograph of Vance Williams and Silva being led away in

³ Although some of the Eighth Circuit's opinions have been read to require that the enterprise be proved by evidence other than the evidence that establishes the pattern of racketeering activity, that interpretation is inconsistent with this Court's decision in *Turkette*, which explicitly stated that the evidence used to prove the enterprise and pattern of racketeering activity may coalesce (452 U.S. at 583). Since *Turkette*, the courts of appeals have uniformly rejected this interpretation of the Eighth Circuit's view. See, e.g., *United States v. Qaoud*, 777 F.2d 1105, 1111-1116 (6th Cir. 1985), cert. denied, No. 85-6457 (Mar. 31, 1986); *United States v. Mazzei*, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983); *United States v. Cagnina*, 697 F.2d 915, 920-921 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States v. De Rosa*, 670 F.2d 889, 895-896 (9th Cir.), cert. denied, 459 U.S. 1014 (1982); *United States v. Griffin*, 660 F.2d 996, 1000-1001 (4th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

handcuffs and chains. The next day, Julia Reinhart testified before the jury about the mid-trial drug dealing. Pet. App. 42a-43a.

Silva asked the court to question the jurors regarding their exposure to the publicity. The court declined to do so at that juncture and stated that it would take up the matter at the close of the evidence. The court was never reminded of the request for a voir dire.

The court of appeals reversed the convictions of Silva and (more recently) of Vance Williams because of the district court's failure to conduct a voir dire concerning the possibility of taint from the publicity. It refused to do so, however, for co-defendants Grossman, Watson, and Meraz because "[t]he substance of the [newspaper] articles * * * could not be taken as probative of their guilt" (Pet. App. 47a). The court of appeals did not address the issue with respect to Drake Williams, presumably because he did not raise the issue in his brief in the court of appeals.

Petitioner did file a belated motion in the court of appeals to adopt the argument on this point made by co-defendant Silva. Even if that motion preserved the issue for appellate review, however, Drake Williams is entitled to no relief from the court of appeals' failure to address the publicity claim because that claim is obviously meritless with respect to him. The court of appeals' conclusion with respect to co-defendants Grossman, Watson, and Meraz applies equally to Drake Williams: the publicity about Vance Williams and Oscar Silva's conduct and bail revocation could not have tainted the jury's deliberations on Drake Williams' guilt.

Petitioner's failure to remind the district court of the request itself strongly suggests the lack of any prejudice. More important, Drake Williams was not a party to the misconduct that gave rise to the publicity, and the district court did not revoke his bail or take any other action suggesting a view about his guilt. Any suggestion of prejudice resulting from one article's reference (on an inside page) to the " 'alleged gang headed by certified public accountant Drake Williams' " (see Pet. App. 62a) or from the picturing of Vance Williams, whom the article expressly pointed out was Drake's twin brother (*ibid.*), is entirely speculative. As we point out below, the jury exhibited no difficulty differentiating Drake from Vance during the trial. Given the abundant evidence of Drake Williams' role as the kingpin of the drug organization, there is no reason to believe that the jury verdict was swayed by the publicity concerning his brother and Silva.

3. Petitioner Drake Williams raises a number of other issues, which were fully addressed in the opinion of the court of appeals. Rather than answering those claims in detail, we rely principally on the analysis in the court of appeals' opinion.

a. Petitioner Drake Williams claims (87-70 Pet. 10-12) that in order to avoid juror confusion, his case should have been severed from that of Vance Williams, his identical twin brother. As the court of appeals observed (Pet. App. 28a), the request for a severance was a matter within the district court's discretion, and nothing in the record demonstrates that the denial of a severance constituted an abuse of discretion. The two brothers played distinct roles in the enterprise and the district court instructed the jury to give each defendant separate consider-

ation. The split verdict rendered by the jury is an indication that it was fully capable of following the court's instructions. Nothing in the record suggests that Drake Williams was convicted on any count because his twin brother was a co-defendant.

b. Drake Williams alleges (87-70 Pet. 9-10) that the district court should have severed his case from that of co-defendant Jan Grossman so that he could have had access to Grossman's testimony, which Drake Williams regarded as exculpatory. As the court of appeals concluded (Pet. App. 27a), Drake Williams' severance motion "contained only conclusory statements as to the exculpatory nature of Grossman's [proposed] testimony" (*ibid.*), and Williams did not present to the district court an affidavit from Grossman averring that he would take the stand and testify on Williams' behalf if they were tried separately. Although such an affidavit may have been in the record of proceedings transferred from another district (87-70 Pet. 9-10), petitioner effectively waived reliance on that affidavit by failing to call it to the court's attention.

c. Finally, Drake Williams assails the conduct of the trial judge during the trial proceedings (87-70 Pet. 5-8). The court of appeals carefully reviewed the conduct of the trial judge, including the incidents about which petitioner now complains (see Pet. App. 22a-37a). Viewing the lengthy record of the eight-week trial as a whole, the court concluded that, although the district judge had occasionally made inappropriate comments, his remarks did not impair Drake Williams' right to a fair trial (*id.* at 35a; see *Glasser v. United States*, 315 U.S. 60, 82-83 (1942)). That fact-specific ruling is correct and does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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